INTELLECTUAL PROPERTY:

PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW,

AND JUDGMENTS IN

TRANSNATIONAL DISPUTES

(with Comments and Reporters' Notes)

Part II

JURISDICTION

Chapter 3

Jurisdiction over Simplification: Coordinating Multiterritorial Actions

§ 221. Coordination Authority of the Court First Seized with an Action Involving the Party Seeking Coordination

(1) Any party engaged in actions involving the same transaction, occurrence, or series of transactions or occurrences in the courts in different States may move to have the actions coordinated through cooperation or consolidation under these Principles. The motion shall be timely submitted and specify the actions to be coordinated.

(a) If the parties in all the actions are the same, the motion should be made in the court first seized.

(b) If the parties in all the actions are not the same, the motion should be made in the court first seized with an action involving the moving party.

(c) Where permitted by local law, the court first seized may consider coordination on its own motion, while affording the parties an opportunity to be heard in the matter.

(2) If the court designated by subsection (1) finds that some or all of the claims in the specified actions in other courts arise out of the same transaction, occurrence, or series of transactions or occurrences as the claims before the court, the court shall assert coordination authority over those actions and decide, in accordance with § 222, whether the actions will proceed through cooperation or consolidation or a combination of the two.

(3) Any other court before which an action is pending that contains claims that the designated court has deemed to fall within its coordination authority shall follow the procedures set out in § 223.

(4) A court is "seized":

(a) when the document instituting the action, or an equivalent document, is filed with the court, provided that the plaintiff subsequently takes the required steps to provide notice to the defendant; or

(b) if the document has to be served before being filed with the court, when it is served or received by the authority responsible for service, whichever is earlier, provided that the plaintiff subsequently files the document with the court.

(5) A court seized with a coercive action seeking substantive relief is "first seized" when:

(a) the subject matter of the action is not within another tribunal's exclusive jurisdiction under § 202; and

(b) no other court had previously been seized with a coercive action seeking substantive relief; and

(c) in the case of actions between different parties, no other court has a pending motion to coordinate actions under subsection (1).

(6) If the court in which a motion to coordinate is pending fails within a reasonable time to take the necessary steps to act on the motion, or if the court before which actions have

been consolidated cannot be expected to render a decision within a reasonable time, then the nondesignated court or courts may proceed to adjudicate.

Comment:

a. Definitions of coordination and coercive action. The Principles use the generic term "coordination" to refer to two approaches to simplifying and reducing the cost of multiterritorial intellectual property litigation: consolidating several actions and facilitating cooperation among the courts of more than one State. (Parallel actions in courts within a single State are left to the State's own internal law.) Coordination requires a determination that the actions are sufficiently related, as well as a decision on the form of coordination (whether consolidation or cooperation).

A "coercive action" is any action seeking substantive relief that is not a declaratory-judgment action.

b. Multiple actions. For many disputes, all of the actions will be between the same parties. However, as the Illustrative Overview makes clear, this is not always the case. Section 221 builds on the lis pendens doctrine to assign the coordination role to the court first seized with a coercive action (when there are multiple parties see § 221(1)(b)). The court designated by this provision will not necessarily try the case. If cooperation is the chosen mode of coordination, then each court will keep its part of the case. If consolidation is chosen, the designated court will have the discretion—informed by the parties—to find a court well suited to resolve the entire dispute. In some cases, a combined approach may be best.

To avoid delay, motions to coordinate must be made in a timely manner, which will usually be no later than the time of the first defense on the merits. If the motion to coordinate is made later than the first defense on the merits, the court should require the party making the motion to justify the delay and should assure itself that ruling favorably on the motion will not

prejudice the interests of other litigants. Typically, the justification would entail a showing that the party was unaware that the other actions for which coordination is sought had been, or would be, filed. If the court determines that a motion to consolidate should not be granted because delayed consolidation would cause prejudice, it should entertain the parties' motion to consider whether cooperation would nonetheless be appropriate (or, where local law permits, address the question on its own motion).

c. Scope of coordination authority. Section 221(2) clarifies the scope of the requirement that the designated court consider coordination. It utilizes the same concept of "claims aris[ing] out of the same transaction, occurrence, or series of transactions or occurrences" that was developed in § 212, Comment d. Section 221 avoids the "cause of action" terminology that has proved ambiguous in the United States. The "same transaction" concept goes beyond pure parallelism to draw into the court first seized all actions that, from efficiency and fairness perspectives, should be tried in a coordinated fashion. Thus, disputes over intellectual property rights concerning the same creative product, work, or material should be regarded as arising from the same series of occurrences.

Illustrations:

1. GizmoCo, a Freedonian company, and WidgetteCo, a Patrian firm, both market a line of widgets worldwide. Each widget comes with a user's manual that describes its care and use. WidgetteCo brings an action against GizmoCo in Freedonia, claiming that GizmoCo's newest widget infringes WidgetteCo's Freedonian patent. GizmoCo retaliates with an action in Patria seeking a declaration that WidgetteCo's Patrian patent is invalid and not infringed, and asserting a claim that WidgetteCo's latest user's manual infringes the copyright in Gizmo's manual. One of the parties wishes to have the dispute treated in a coordinated fashion.

The Freedonian court has authority to coordinate under § 221(2), as all of the claims relate to the same set of occurrences: alleged infringements of rights surrounding the marketing of widgets. If there are other claims (for example, trademark claims) relating to the widget, these could be asserted under § 212 as supplemental claims and brought within the Freedonian court's coordination authority.

2. DanceCo, a Patrian corporation, has a contract with X, a Xandian choreographer, to perform X's dances within Patria. DanceCo taped a performance in Patria for broadcast on television, knowing that the signal could, and would, be picked up in neighboring Xandia. X sues DanceCo in Patria for infringement; DanceCo later sues X in Xandia for a declaration that there is no infringement, as the contract permits this activity and does not require DanceCo to take steps to avoid retransmission of the taped performance. One of the parties wishes to have the dispute treated in a coordinated fashion.

Since the court first seized is the Patrian court, that court is, as an initial matter, the one authorized to hear the infringement case (§ 221). Although the claims asserted in Xandia could be classified as contract claims, they arise from the same transaction that is the subject of the Patrian action. The Patrian court will decide whether coordinated treatment is appropriate. If so, it will determine where and how the infringement claims should be adjudicated, in accordance with § 222. It may take over the entire dispute, in which case the Xandian court will suspend proceedings in accordance with § 223. Alternatively, the two courts may enter into a cooperative arrangement. Were the Xandian court to render a judgment without regard to the Principles, the judgment might not be entitled to enforcement. See § 403(2)(c).

Section 221(1)(c) also gives the designated court authority to consider coordination on its own motion. The efficiencies that can be achieved are as much an interest of the judicial system as they are of the parties. However, both cooperation and consolidation require

participation by the parties; see, e.g., § 222(2) and (3), § 222, Comment d, and § 223, Comment b. Accordingly, the court's main role is to make the parties aware of the possibilities; it is not likely that coordinated treatment can proceed without voluntary participation.

Because the designated court's authority extends initially only to the question of coordination, it need not have personal jurisdiction over all of the potential parties. The court that ultimately adjudicates an action involving a particular party must, however, have personal jurisdiction over that party.

d. Exceptions. There are several exceptions to the designated court's coordination authority.

(1) § 221(5)(a). This provision preserves party autonomy. Disputes that stem from activities subject to a contract with a choice-of-an-exclusive-court clause must be litigated in the court specified. See § 202. If the effect of enforcing the choice-of-court clause is inefficient, the parties can waive their rights under the clause.

A problem arises when there are conflicting choice-of-court provisions, each valid under § 202. In such cases, the definition of the court first seized in § 221(5) may not lead to an unambiguous solution: no matter which court is seized first with a coercive action, there will be another court that arguably has exclusive jurisdiction over the subject matter. In such cases, whichever court is seized first with a coercive action should regard itself as the court first seized for the purpose of this provision. That court should consider the effect of the divergent agreements as set out in § 202, Comment e.

(2) § 221(5)(b). This exception is designed to prevent a party from manipulating this system to cause delay. Under this exception, a noncoercive action—i.e., a suit for a declaration of nonliability—does not trigger the court's coordination authority. This exception is necessary to make sure that a would-be defendant cannot use the Principles' generous

concept of relatedness, which covers claims arising in more than one jurisdiction, as a means of preempting a plaintiff's choice of court. In Europe, for example, "torpedoes"—declaratory-judgment actions brought in courts recognized as particularly slow—have been used to block the right holder from achieving a timely remedy. To prevent this especially corrosive type of forum-shopping, this provision allows a court seized with a coercive action to disregard the pendency of a declaratory claim in another court. Instead, the court hearing the declaratory case must suspend its proceedings and allow the court where the coercive action is pending to take coordination control over the suit. See also § 213, Comment d. If the coordination court decides that the case should be consolidated in another court but the declaratory action goes forward in the initial court, the declaratory judgment may be denied enforcement under § 403(2)(c).

Illustration:

3. DanceCo and X have the arrangements outlined in Illustration 2. However, DanceCo brings a declaration of nonliability in Xandia before X sues in Patria.

Although the first suit arising from DanceCo and X's arrangement was filed in a court in Xandia, that court is not considered "first seized" within the meaning of the Principles.

(3) § 221(5)(c). This Section is intended to avoid a situation in which multiple courts assert coordination authority over the case and issue contradictory orders that, ultimately, delay proceedings. Once one court takes on the task of determining that the dispute should be coordinated, all coordination decisions are left to that court.

(4) § 221(6). The last exception, § 221(6), gives the nondesignated courts the authority to resume entertaining the case if the coordination or consolidation court fails to act in a reasonable time.

(5) Other forms of dispute resolution. Administrative adjudication and arbitral proceedings are not directly controlled by these Principles, because the concerns animating

these forms of dispute resolution are different. Administrative tribunals, such as customs courts, have limited authority, and, in some instances, process is truncated to facilitate speedy resolution. Accordingly, they are not fora in which actions should be coordinated. Parties opt for arbitration because they want to choose their judges and because they believe that arbitration will achieve more rapid resolution of the dispute. When a case is subject to arbitration, judicial proceedings should be stayed, no matter whether the arbitration is filed before or after the judicial case.

Illustration:

4. DanceCo and X, the parties of Illustration 2, have a contract in which a valid provision states that all disputes are to be resolved through arbitration. In that case, both courts will be required to suspend proceedings so that the dispute can be arbitrated. This is by analogy to § 221(5).

e. Reasonable time. Reasonable time is measured by reference to pendency times for cases of similar complexity in the court in which the action is stayed.

Illustration:

5. The same facts as in Illustration 2. If the Patrian court does not proceed within the time frame in which litigation of the same type would have been resolved in Xandia, the Xandian court may proceed with the case.

REPORTERS' NOTES

1. *Multiple competent courts*. Lawyers in the United States are comfortable with solving the parallel-litigation problem by giving courts discretion to transfer cases to an appropriate court. See, e.g., 28 U.S.C. §§ 1404, 1407. However, there is profound disagreement on this issue in other places. The practice in the European Union, for example, is to give absolute preference to the court first seized. Once it is determined that this court has jurisdiction to

hear a case, other courts entertaining the same cause of action must suspend proceedings, and if the first case goes forward they must ultimately decline jurisdiction. Brussels Regulation art. 27. Courts entertaining related causes of action may, upon application of the parties, also stay out, so long as the court first seized has jurisdiction over these related claims and the actions "are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings," id. art. 28. Section 221 is somewhat similar. However, the choice of court does not end with the court first seized. Once the case is constituted, subsequent provisions give the court authority to move the case to a more appropriate court (§ 222).

2. *Scope of coordination*. The Principles avoid the term "causes of action," because it can be confusing. Instead they rely on the transactional approach discussed in connection with § 212.

3. "*Torpedo" problems*. The ALI Foreign Judgments Project recognizes a broadly defined doctrine of lis pendens (or coordination authority), such as the one defined here, which covers claims arising in more than one jurisdiction, ALI Foreign Judgments Project § 11(a). It recognizes that this procedure could be used by a potential defendant to preempt a plaintiff's choice of court and to defeat the jurisdiction of the most appropriate court. See ALI Foreign Judgments Project, §§ 11(b), 5(c)(iii)-(iv). See also Robin Jacob, International Intellectual Property Litigation in the Next Millennium, 32 Case W. Res. J. Int'l L. 507, 511-512 (1999); Paul A. Coletti, No Relief in Sight: Difficulties in Obtaining Judgments in Europe Using EPO Issued Patents, 81 J. Pat. & Trademark Off. Soc'y 351, 367 (1999); Trevor C. Hartley, How to Abuse the Law and (Maybe) Come Out on Top: Bad-faith Proceedings Under the Brussels Jurisdiction and Judgments Convention, in Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren 73 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002). Requiring the court hearing the declaratory case to suspend its

proceedings and allow the coercive action to go forward is in accordance with practice in the United States; see, e.g., Elbex Video, Ltd. v. Tecton, Ltd., 57 U.S.P.Q.2d 1947, 1949 (S.D.N.Y. 2000) (agreeing to hear a second-filed coercive action on the ground that circumstances demonstrated that the first-filed declaratory-judgment action had been filed "in order to deprive plaintiff of its choice of forum").

4. *Reliance on the court first seized.* It can be argued that it is wrong to give control over the litigation to the court first seized because this approach promotes races to the courthouse. Ideally, decisions on coordination should be made by a sitting body. For example, consolidation in the United States is controlled by the Panel on Multidistrict Litigation in the United States; see 28 U.S.C. § 1407. However, such a body cannot be created in Principles such as these. Using the court first seized has the advantage of relative simplicity. To the extent that multinational litigation often ends when the plaintiff wins an action in the defendant's largest market, this choice is no worse than the result under current practice. Indeed, it is significantly better because the court first seized starts with only coordination authority; it may not be the court that ultimately decides the case.

5. *Determining when a court is seized*. It is important to prevent ambiguity as to the time when a court is seized. Section 221(4) is adapted from art. 30 of the Brussels Regulation on the theory that it is based on substantial experience with the 1968 Brussels Convention.

§ 222. Coordination Among Courts and Consolidation of Territorial Claims by the Court First Seized

(1) If the court designated by § 221 decides that related actions will be coordinated, it then determines whether coordination should proceed through cooperation, consolidation, or a combination of the two. Considerations bearing on this matter include:

(a) the convenience and efficiency of centralized adjudication versus the convenience and efficiency of cooperation;

(b) the cost of pursuing related actions in multiple courts;

(c) the need for specific expertise in light of the complexity and novelty of the legal issues;

(d) the time required to resolve all the claims;

(e) the relative resources of the parties;

(f) whether there is a court with adjudicatory authority over all the parties under §§ 201-207;

(g) whether adjudication by multiple courts could result in inconsistent judgments; and

(h) whether the judgment resulting from consolidated proceedings will be enforceable in other States.

(2) If the court determines that coordination of all or part of the dispute is appropriate, it should invite the parties to identify other related pending actions between any of the parties to the dispute and other litigants that the court should, in order to promote efficiency, consider for inclusion in the coordination plan.

(3) If the court determines that cooperative resolution of all or part of the dispute is appropriate, the court shall so inform all courts involved in the coordination and order the parties to draw up a plan for resolving the dispute in a just and expeditious manner.

(4) If the court determines that consolidation of all or part of the dispute is appropriate, the court shall next decide, in a timely manner, whether to retain jurisdiction over the consolidated action or instead to suspend proceedings in favor of another court. Considerations bearing on this matter include:

(a) which State has the closest connection to the dispute; in deciding this the court should take into account:

(i) any enforceable choice-of-court clauses in contracts relevant to the dispute between or among any of the parties;

(ii) the States in which the parties reside;

(iii) the relative resources of the parties;

(iv) which States' intellectual property rights are in issue; and

(v) the State whose law governs initial title to the intellectual property rights or other rights in issue under §§ 311-313;

(b) which court has authority to adjudicate the fullest scope of the consolidated action, taking into account the court's authority over the subject matter and the parties;

(c) the difficulty of managing the litigation, including the complexity, familiarity, and novelty of the legal issues, and, particularly in patent cases, the expertise of each potential consolidation court;

(d) the availability of process to summon and examine witnesses and obtain nontestimonial evidence, and the location of the evidence and of witnesses;

(e) each potential consolidation court's power to award an adequate remedy; and

(f) the availability of judicial process consistent with international norms.

(5) The issues of cooperation and consolidation shall be decided in a timely manner.

(6) A party seeking to appeal a decision on coordination or consolidation shall do so at the first opportunity provided by the jurisdiction of the court that made the decision. Failure to do so constitutes a waiver of the right to appeal the decision.

Comment:

a. Coordination. Once the court with coordination authority has determined under

§ 221 that adjudication of the dispute should be coordinated, § 222 comes into play. This Section does three things. First, it sets out criteria for the coordination court to determine how the dispute should be adjudicated: by cooperation or by consolidation. Second, it instructs the coordination court to look beyond the disputes between the parties to determine whether any of these litigants are involved in other disputes that could usefully be combined with the litigation before it. Third, it tells the coordination court what guidance it must give in managing the dispute. In the case of cooperation, it must help the parties set up a cooperative schedule; in the case of consolidation, it must choose the consolidation court.

b. The form of coordinated adjudication. A court faced with a motion to coordinate has four options: (1) to deny the motion; (2) to institute cooperation among the relevant courts; (3) to order consolidation of all or part of the dispute before a single court; or (4) to utilize a combination of cooperation and consolidation. These Principles do not favor any particular method of coordination. Consolidation is more likely to conserve resources and lead to more timely and coherent adjudication. Cooperation may be easier for a court to implement, especially when registered rights are at stake and in jurisdictions where legislative intervention would be required to expand the court's authority over the parties or the dispute or to recognize the judgment. It will typically take the form of allowing each court to continue adjudication of its part of the dispute. However, the coordination court may streamline the process, for example, by centralizing the taking of evidence and finding of facts, determining the order in which the issues will be considered, or otherwise structuring the way in which the case is litigated.

Illustrations:

1. GizmoCo, a Freedonian company, and WidgetteCo, a Patrian firm, both market a line of widgets worldwide. Each widget comes with a user's manual that describes its care and use. WidgetteCo brings an action against GizmoCo in Freedonia, claiming that GizmoCo's

newest widget infringes WidgetteCo's Freedonian patent. GizmoCo retaliates with counterclaims, asserting that WidgetteCo is infringing the copyright in Gizmo's latest manual and asking for a declaration that GizmoCo's Freedonian patent is invalid. Gizmo also initiates a suit in Patria for copyright infringement there and for a declaration that WidgetteCo's Patrian patent is invalid and not infringed. A party moves for coordinated treatment.

The joinder of claims in each court is supported by § 212 because they arise from the same occurrences involving the marketing of the widgets. Under § 221, the Freedonian court, where the first action was filed, may take coordination authority and decide that further coordination is possible. Under § 222, it must next determine the form of coordination. If only copyright claims were at issue, consolidation would likely be the method most appropriate. However, because both cases raise patent-validity issues, cooperation may be the more prudent course.

If cooperation is chosen as the method of adjudication, the Freedonian court will, with the aid of the parties, set a schedule for adjudicating the factual and legal issues in the case. For example, the parties may agree to take evidence from the inventor or inventors in a single proceeding and use that examination in both validity suits; the parties may choose a single embodiment (or set of embodiments) of the invention to be used for the determination of patent infringement. Further, the parties may agree to be bound by one court's decision on infringement.

The court could also utilize a combined approach, in which the patent claims remain before State courts (which coordinate their activities), and copyright claims are consolidated before a single court.

2. Consider the Illustrative Overview, in which a file-sharing program is developed by JCo, which proceeds to divide exploitation up territorially. A single plaintiff, MajorMovieCo, sues the users in several locations.

These cases involve different parties, but § 221 contemplates the possibility that one of the parties will move for coordination. In this dispute, consolidation is appropriate because all the cases raise claims concerning the same subject matter and because the issues in all of them are whether file-sharing is infringing activity and whether the distribution of a program that facilitates file-sharing should be actionable on a theory of primary or secondary infringement liability. Furthermore, there is a strong risk that multiple adjudication will not yield a uniform resolution of the question whether JCo's file-sharing program should be available on the Internet. If, for example, India were to rule that the activity is an important avenue of public access and were to permit JCo to continue to operate, but Japan were to enjoin JCo from maintaining the program, each outcome could undermine the policies of the other State.

A party resisting consolidation could try to show that the laws of the relevant countries are significantly different on the issue of secondary liability. If there is strong reason to believe this is so, the designated court should consider adjudicating the factual part of the dispute in a single action and then allowing each State where claims are pending to consider the legal ramifications of the facts found. Or, if only one State's law on secondary liability is unclear, the court might provide for separate consideration of that part of the case. However, before structuring the litigation in this way, the coordination court must consider the possibility that this approach will yield inconsistent outcomes. If the cost of inconsistency is higher than the cost of clarifying the content of foreign law, then the case should be consolidated.

It should be recognized that cooperative or consolidated litigation will not necessarily lead to the application of the same law for all territories. See §§ 301 and 321. However, the consolidated approach should facilitate reconciliation of the potentially conflicting outcomes under each relevant State's law and give the parties guidance on how they can lawfully proceed on the Internet.

c. Factors to be taken into account in determining the method of coordination. The factors listed in § 222(1) aid the coordination court's determination of how the adjudication of a multiterritorial dispute should be coordinated. No one factor will be dispositive in every dispute, although there are likely to be cases where the choice is clear. Thus, a crucial factor is whether there is a court that has the adjudicatory authority to hear all or most of the entire dispute. Where there is no such court, cooperation will be the only method available to coordinate adjudication. For example, if a party seeks to declare patents in multiple countries invalid as against the world, the dispute cannot be consolidated in a single court under § 213. On the other hand, if that party confines the adjudication to declarations that run only between themselves, consolidation remains possible. In situations where all or some of the dispute can be heard in a single tribunal, the coordination court should consider issues such as convenience, cost, speed, and the effort to learn about the technology at issue; it should also weigh the benefits of particularized adjudication of each case against the risk this will impose unnecessary expense and indeterminacy.

The decision on coordination also requires consideration of the relative resources of the parties: the distances they will be required to travel if the dispute is consolidated, as well as each party's ability to hire lawyers to deal with unfamiliar procedure, substantive law, and language, and to pursue its claims and defenses in the context of a larger dispute. Note that the relevant issue is how able the parties are to deal with these issues; not how these matters affect the outcome.

In addition, the coordination court should consider whether the legal issues posed are ones of first impression in any of the affected jurisdictions. While efficiency concerns might counsel consolidation of the claims, it may not be desirable for the consolidation court to apply a foreign law in anticipation of what that jurisdiction's highest court might ultimately rule. An alternative might be to certify the question to the foreign court. In the absence of

such a procedure, cooperation rather than consolidation may be more solicitous of national sovereignty.

Cooperation is also preferable to consolidation when one of the actions within the scope of § 221 presents a multiplicity of claims, only some of which are common to the other actions. In such situations, the coordination court can decide that consolidated adjudication of the case involving the multiple unrelated claims does not contribute to overall efficiency.

In the final analysis, cases involving exploitations that have an impact on many jurisdictions simultaneously (such as Internet distributions) are likely to be the strongest candidates for consolidation, at least in situations where segmentation of the distribution chain is not possible.

d. The roles of the parties and other courts. Given that these are Principles and not legislation, the disputants are expected to take the leading oar in implementing these provisions. In many cases, it will be in the interest of all of the litigants to take a particular approach to streamlining the adjudication. However, there may be cases where the parties disagree on whether or how to coordinate the actions. In such cases, the court's determination of whether and how to coordinate should take into account the relative merits of the parties' arguments and the public interest in conserving judicial resources.

It would also be useful for the courts in which actions are pending to consult with one another to determine the most appropriate court. This is not mandated by the Principles, in large part because such consultation is not currently common. Such a requirement could, accordingly, lead to protracted delay and a new "torpedo" problem. Instead, the Principles utilize stays initiated by the parties. If delay becomes a problem, a court in which an action is stayed can revoke the stay.

Illustration:

3. Consider the Illustrative Overview: MajorMovieCo moves in the Japanese court to consolidate the actions brought elsewhere. Once the decision is made to consolidate, the parties will also bear the burden of moving for stays under § 223 in the tribunals in which related actions are pending. Although these Principles expand the bases of personal jurisdiction to facilitate consolidation (see § 206), in the absence of implementing legislation, it may be the case that parties asking for stays will be required to agree to waive objections to personal jurisdiction in the court chosen for consolidation. The courts considering stays could also demand agreements on other matters. Thus, for example, if USCo wanted information from MajorMovieCo that would have been available through discovery in the United States but not in Japan, the stay could be granted subject to an agreement by the parties to furnish one another with equivalent discovery.

e. Factors for determining the location of the suit. In many States, courts are reluctant to dismiss suits unless the claims are pending elsewhere. This creates a de facto presumption that the designated court will hear the consolidated case. However, that court may transfer the case to another tribunal. This procedure not only adheres to a procedure akin to lis pendens, with which much of the world outside the United States is familiar, it also avoids the prospect that courts will handle the related cases in inconsistent ways. The factors that the court should consider include the following:

(1) The closest connection to the dispute, § 222(4)(a). Many of the cases likely to benefit from consolidation involve the “spider and web” configuration. In such situations, the most appropriate place to consolidate is likely to be the home of the spider (or the hub to which the spokes are attached). The main evidence in the case is likely to be found in that jurisdiction, and that court is in the best position to enforce the judgment and monitor compliance.

It is conceivable that the spider could center its web in a jurisdiction where process is slow or enforcement lax. In such circumstances, the case should not be consolidated in the spider's home. Efficiency is an overarching consideration; see § 222(2). Further, under § 222(4)(f), consolidation should be in a court in a State that offers process consistent with international norms. The ALI/UNIDROIT project and the TRIPs Agreement afford examples of fair procedures.

Registered-rights cases should also be analyzed under this provision. A court entertaining an action largely centered around a challenge to the validity of a registered right should consider deferring to a court in the place of registration. In any other court, the adjudication of this right will affect only the parties under §§ 211-213 and 413.

This subsection is also relevant to contract cases. When there is only one enforceable choice-of-court clause relevant to the case, consolidation should be in the court chosen by the agreement. A problem arises, however, when there are multiple choice-of-court provisions, each valid under § 202, but which designate divergent fora. In such cases, the court should consider the factors set out in § 202, Comment e, along with the other factors in subsection (4)(a) to determine the consolidation court. If there is no choice-of-court clause in any contract, the case should be adjudicated in the court with the most significant relationship to the contract. This is determined by the residence of the parties, the rights that are the object of the contract, and the source of initial title.

Subsection (4)(a)(v) introduces the concept of the State of initial title, which is further developed in §§ 311-313 and accompanying commentary. The notion here is that intellectual property subject matter with an obvious national identity deserves special consideration. Because one of the principal functions of intellectual property law is to stimulate and shape the creativity of a nation's citizenry, the State of initial title has a strong interest in the dispute, and perhaps even insights, and access to the evidence, needed to resolve it.

(2) Authority over the parties, § 222(4)(b). The court that ultimately adjudicates a dispute must have adjudicatory authority over all of the parties. In many instances where the claims are related enough to consolidate, the Principles give several courts authority over all (or most of) the defendants. But in cases where there are significant differences in adjudicatory authority, the court chosen for consolidation should, other things—such as resources—being equal, be the court with adjudicatory power to hear as much of the worldwide dispute as is possible.

(3) Authority over the subject matter, § 222(4)(b). Although these Principles facilitate consolidation, they do not require States whose courts adopt these Principles to alter the subject-matter jurisdiction of their courts. Accordingly, the court chosen should, all other things being equal, be one with the power to handle as much of the dispute as possible.

There may be cases where no court has authority over the entire dispute, but several courts could assert power over large parts of it. In such cases, the coordination court should take account of where the most significant impact lies. Thus, while another court may have power over more parties (or more claims), the coordination court may nonetheless choose a forum in the State of the most significant impact. In such situations, the court should consider coordinating proceedings with the courts hearing the remainder of the dispute. If the problem is adjudicatory authority over the parties, they may be willing to waive jurisdictional objections in the interest of efficiency; when the problem is subject-matter authority, the parties may choose to enter into a settlement agreement resolving the claims outside the court's power.

Illustration:

4. Elena Inc., a Xandian trademark holder, discovers that a Patrian company is offering goods bearing a confusingly similar trademark over the Internet. Xandia's subject-matter jurisdiction does not extend to foreign intellectual property claims, while Patrian courts would

entertain the worldwide dispute. Elena Inc. files suit in Xandia and the defendant then files an action in Patria, seeking a declaratory judgment of noninfringement in Patria and in other jurisdictions. It asks the Xandian court to stay the case in favor of the Patrian court.

This Illustration involves a choice between hearing the case in the court where the impact of the activity is greatest or in the court with the widest subject-matter jurisdiction. The court should weigh the advantages of proceeding in each court; if Elena Inc. insists on pursuing the action in Xandia, it could consider waiving its claims in other jurisdictions.

(4) Novel or complex issues, § 222(4)(c). Consolidation is greatly facilitated by the convergence of legal regimes because it becomes ever easier for courts to entertain foreign claims. Theories of law that are novel raise special issues, however, as only the jurisdiction whose law is at issue can authoritatively resolve the problem. In some situations, the best course will be to deny consolidation or to grant it on a partial basis (for example, leaving out the dispute involving the novel question) and cooperating with a court in the State in which the novel issue arises. In some situations, however, it may be possible to solve the problem by simply consolidating the case in a court in the State where the law is unsettled.

Illustration:

5. Under the facts of the Illustrative Overview, if Japanese courts have the competence to consider foreign copyright claims, then the case should be consolidated in Japan. JCo is the spider in this web and each of the other defendants is subject to jurisdiction in Japan. If, however, Indian law on secondary liability is unclear, that part of the case can be dealt with separately (or with cooperation between the Indian and Japanese courts). Alternatively, the Japanese court should consider the possibility of consolidating the whole case in India.

(5) Expertise in patent cases, § 222(4)(c). The Principles allow courts entertaining patent cases to transfer adjudication to courts with patent-law expertise. To the extent that patent laws involve highly technical issues that are resolved in different ways by different

States, the court with expertise may well be the court where the right is registered. Thus, cases that raise only patent issues under one State's laws should normally be resolved in courts in that State. Further, when a dispute involves patent rights in more than one State, a cooperative approach might be preferable to consolidation. In some situations, however, consolidation may be possible in a specialized patent court, such as the UK Patent Court, or in a general trial court where the appeal is to a specialized court, such as the United States Court of Appeals for the Federal Circuit. When litigation in multinational cases can be directed to systems with these types of fora, consolidation may be a more efficient method of adjudication.

(6) The availability of process and remedies, § 222(4)(d) and (e). Experience demonstrates that fora can differ markedly in their capacity to clear their dockets. Accordingly, the coordination court should, other things being equal, choose a court where the case will be reached and resolved speedily.

Further, the coordination court must take into account the ability of the parties to develop their case fully, including the availability of devices to determine the identity of parties (such as subpoena authority) and discovery devices necessary to establish facts relevant to particular claims or defenses. In this regard, the court should look not only at the procedures available in the court it is considering for consolidation, but also the extent to which that court will be able to draw on supplementary assistance from other courts. For example, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 847 U.N.T.S. 231, available at http://www.hcch.net /index_en.php?act=conventions.text&cid=82 (last visited Jan. 3, 2008) (hereinafter Hague Evidence Convention) facilitates discovery within member States; in the United States, local discovery mechanisms may be available to assist in finding evidence for a suit litigated elsewhere. See also Council Regulation 1206/2001 of 28 May 2001 on Cooperation Between

the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174) 1 (EC), available at http://ec.europa.eu/justice _home/judicialatlascivil/html/pdf/oj_l174_20010627_en.pdf (last visited Jan. 3, 2008).

If there is a process available where the action is pending that is not available where consolidation is contemplated, the coordination court could make its order conditional on the agreement by the parties to the use of that process. An example is provided in Illustration 3. Finally, the court should determine whether the remedies being sought (or remedies similar to them) are available in the court being considered for consolidation.

Illustration:

6. X brings a patent infringement action against Y in Switzerland, alleging that Y is infringing X's Swiss patents. X brings a similar action against Y in the United States, alleging infringement of X's U.S. patents. Y counterclaims for a declaration of patent invalidity in the United States and moves in Switzerland for consolidation. Y's theory of invalidity is that X was not the first to have invented the invention. (This defense is not available in Switzerland because priority there depends on who filed first, not who invented first.)

If the Swiss court decides to consolidate the cases, it must consider the question whether the parties will have adequate discovery opportunities to prove dates of invention. The United States accords a wide scope for discovery, but if other factors point to consolidation in Switzerland, then the court must determine whether assistance will be available from the U.S. court. Note that if the claim is resolved in Switzerland, the decision on the validity of the U.S. patent will be effective only among the parties
(§§ 212(4) and 413(2)).

f. Consistency with international norms, § 222(4)(f). The inquiry whether the consolidation court meets international norms is intended to assure the litigants that their case will be determined with transparent and efficient judicial process. Such norms can be found in

the TRIPS Agreement; see arts. 42-49 and the ALI/UNIDROIT Principles of Transnational Civil Procedure. The TRIPs Agreement in particular represents a broad consensus on the powers a court must possess to adjudicate intellectual property controversies adequately.

g. Timing. Because delay and confusion are core concerns, the Principles emphasize dispatch. Section 102(2) requires a timely determination whether a dispute falls within the Principles, § 221(1) requires the parties to move for coordination in a timely manner, § 222(5) asks the court to decide the issue of coordination in a timely fashion, and § 222(6) requires parties who wish to appeal to do so at the first opportunity. Other elements designed to eliminate delay include § 221(5)(b), which disqualifies a tribunal in which a declaratory-judgment action is pending, and § 221(6) and § 223(4), which permit courts where actions were originally filed to resume proceedings if the coordination court or consolidation court does not proceed in a reasonable time.

h. Enforcement. As with the allocation of coordination authority to the designated court, the coordination decision is enforced through § 403(2)(c) and (d). For example, if a dispute is consolidated in a particular court, then the judgment of any other court on that claim may be denied enforcement. The enforcement court is not free to reexamine consolidation decisions.

i. Appeals. The opportunity for judicial review gives litigants confidence in the fairness of the procedure and provides a vehicle for effective development of the law on cooperation and consolidation. However, the appellate process offers rich sources of delay and, when postponed until final judgment, risks wasting significant resources. The advantages of coordination, coupled with the opportunities that §§ 221-223 provide for party participation and settlement, should reduce the number of appeals. Thus, the number of appeals should diminish. A jurisdiction that adopts the Principles might permit interlocutory review of the coordination decision. If, in practice, appeals cause undue delay, it may be appropriate to consider eliminating judicial review of the coordination decisions.

REPORTERS' NOTES

1. Judicial cooperation. An effective way to move toward global dispute resolution is to enlist the aid of the courts where litigation is pending. These courts have a strong interest in saving resources, avoiding inconsistent adjudication and judgments that will not, as a practical matter, be fully enforced. In fact, another place where international adjudication is being seriously considered is in bankruptcy, and, in that instance, the disputes that have proceeded on a global basis have all done so through the offices of the court. See Jay Lawrence Westbrook, International Judicial Negotiation, 38 Tex. Int'l L.J. 567 (2003). Westbrook gives the examples of In re Blackwell, 267 B.R. 732 (Bankr. W.D. Tex. 2001) (involving insolvency cases in Texas, the Cayman Islands, and England, which were handled through a set of protocols accepted by the relevant courts); In re Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996) (involving U.S. and London reorganizations and an operating protocol approved by the courts). Westbrook, supra, at 571-573. See also the ALI's Transnational Insolvency Principles volume (developing such a method for managing bankruptcy within NAFTA countries); UNCITRAL, Model Law on Cross-Border Insolvency, available at http://www.uncitral.org/pdf/english/
texts/insolven/insolvency-e.pdf (last visited Jan. 3, 2008); Frederick Tung, Is International Bankruptcy Possible?, 23 Mich. J. Int'l L. 31 (2001). Pursuant to international agreements, court-mediated cooperation is also common in family-law matters, see, e.g., Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, available at
www.hcch.net/index_en.php?act=conventions.pdf&cid=69 (last visited Jan. 3, 2008); Hague

Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, available at http://www.hcch.net/index_en.php?act=conventions .text&cid=24 (last visited Jan. 3, 2008); Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (last visited Jan. 3, 2008).

The litigants in intellectual property disputes also have substantial incentives to cooperate. For example, it is anticipated that cooperation will likely be most appropriate in registered-rights cases, particularly patent cases, where foreign (and in some cases, domestic) courts lack the capacity to enter a judgment that runs against the world. In such cases, litigation may best be situated in each State in which rights are registered. At the same time, however, substantial benefits could be achieved if, before any trial commences, the parties agree to take the inventor's testimony a single time, choose to focus their disputes on the same embodiments of the accused device, and stipulate to the documents and practices that constitute the prior art, or agree to be bound by a single court's factual determinations. Patent judges are uniquely suited to this approach because they have a longstanding practice of meeting to share expertise in patent adjudication. Moreover, although courts could still arrive at different decisions on validity or infringement, there is no real inconsistency because the laws applied are different, and, in many cases, exploitation in one territory is (at least in theory) unaffected by exploitation elsewhere.

2. Consolidation practice. Both the United States and the European Union have ways to avoid a multiplicity of suits over the same issues, but in both places, current practice makes complete consolidation difficult. The Principles attempt to take advantage of pro-consolidation features in both U.S. and European systems. It is not likely, however, that they could be fully implemented in either (or any) judicial system without the intervention of the

highest court or the legislature. For example, multijurisdictional patent cases subject to the Brussels Regulation could not be consolidated without a change in the registered-rights limitation of art. 22(4); nor could a case in that system be consolidated in a court other than the one first seized without a change in the lis pendens doctrine of art. 27. Although U.S. law is more flexible, it too has limits. For example, it has been held that a declaratory-judgment action raising federal trademark issues cannot be stayed pending adjudication of a state claim arising from the same transaction, when the federal claim was filed first and there was no indication that it was filed for an illicit purpose; see Verizon Commc'ns, Inc. v. Interverizon Int'l, Inc., 295 F.3d 870, 874 (8th Cir. 2002); Voda v. Cordis Corp., 476 F.3d 887 (Fed. Cir. 2007).

3. Factors to consider in determining the court appropriate to hear the dispute. Although the coordination authority provision could be expanded to centralize the dispute in the court first seized with the action, thereby limiting judicial discretion in accordance with (what can be perceived to be) the preferred approach outside the United States, the rigidity of that solution was rejected. It would give the first plaintiff too much control over the litigation. More important, it would sometimes situate litigation in a court ill-suited to the task of dealing with complex matters or in a court far removed from the dispute. It is also important for the court first seized to consider whether a potential consolidation court will apply fair, equitable, and transparent civil judicial procedure. At the same time, however, controversy over judicial discretion must be avoided. The Principles therefore give the court administrative authority to determine which court should ultimately entertain a consolidated dispute.

The AIPPI Resolution includes several considerations relevant to determining the appropriate court. The main factor is the "country where the infringements or the acts leading to infringement ('infringing acts') take place." AIPPI, Q174 Resolution, Recital b. But the

Resolution continues: “to avoid abuse of forum shopping, there should be some nexus (based on serious and objective criteria) between the forum chosen and the infringing acts.” Id. That approach is rejected here. Many of the cases where consolidation will be appropriate involve Internet distribution. If the place of the infringing acts is regarded as the place where the material is uploaded to the Internet or where the servers are located, it will be too easy for the defendant to situate itself in a place inhospitable to intellectual property protection. Requiring a nexus between the forum State and the acts does not solve the problem, because the focus remains on the acts. Furthermore, the nature of the nexus is not specified.

Instead, these provisions look to the capacity of the courts, their authority over the parties, and their relationship to the dispute and to the law that will be applied. In the spider-and-web scenario, these factors should point to the home of the spider. Indeed, in most cases, these factors, combined with the jurisdictional leeway provided by § 206, will point the case to the residence of the principal defendant.

The provision for novel and complex questions is taken from U.S. law on supplemental jurisdiction, 28 U.S.C. § 1367(c)(1).

(a) Expertise in patent cases, § 222(4)(c). The patent bar had been particularly concerned that the complexity and technical difficulties that patent cases present to lay judges make these cases unsuitable for foreign adjudication. The bar pointed out that national patent laws are more diverse from one another than are other intellectual property laws. As a result, judges are less likely to decide foreign patent cases accurately. Moreover, many jurisdictions channel patent cases to specialized tribunals. The benefits of channeling would be undermined if a foreign court were allowed to decide some of these cases. Many patent lawyers thus do not see a role for consolidation, even in infringement actions; they would prefer to have every patent case decided by a court of the State whose law is in issue.

As more patent applicants apply for protection in Europe via the EPC or centrally through the PCT, these concerns, at least insofar as they apply to issues concerning registration, may abate. Nonetheless, the Principles endeavor to address these problems by offering the cooperation alternative. If the coordination court chooses consolidation, it should direct the litigation in multinational cases to systems with specialized fora. Since most multinational disputes are likely to include claims under the law of at least one State that has such a court, this choice will usually be available. Admittedly, the expertise of the judges on these courts is currently in their own State's patent law. However, their ability to handle technical materials and their intimate knowledge of core patent principles (such as those imposed on all member States by the TRIPS Agreement) would likely make them at least as good at handling foreign patent cases as generalist judges in the State whose law is in issue. This benign form of forum-shopping may institutionalize over time, so that a specific set of courts would handle most consolidated patent actions. Cf. Kimberly A. Moore, Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?, 79 N.C. L. Rev. 889, 903 (2001) (showing that patent cases in the United States tend to channel to 10 judicial districts).

(b) The availability of process, § 222(4)(d). Examples of procedures that must be considered include, in U.S. law, the subpoena authority available under the Digital Millennium Copyright Act, 17 U.S.C. § 512(h), and discovery devices under Fed. R. Civ. P. 26-37, 45. Elsewhere, devices such as Anton Piller orders (renamed search orders since April 1999) and "saisie-contrefaçon" measures are relevant examples. "Anton Piller orders," Anton Piller KG v. Manufacturing Processes Ltd, [1976] Ch. 55 (C.A. 1975), were approved by the House of Lords in Rank Film Distributors Ltd. v. Video Information Centre, [1982] A.C. 380 (H.L. 1981). It is an ex parte order, used in cases where the court believes there is a danger that the defendant will remove or destroy evidence in the form of documents or moveable

property, such as money, papers, or illegal copies of films, see P. Todd and S. Wilson, Textbook on Trusts, Oxford Univ. Press 447 (2003). The Code de la propriété intellectuelle [Intellectual Property Code], art. L615-5, available at http://www.legifrance.gouv.fr/./affichCode.do?cidTexte= LEGITEXT000006069414&dateTexte=20080118 (last visited Jan. 3, 2008) (Fr.), provides for the similar measure of "saisie-contrefaçon." See also Pro Swing, Inc. v. Elta Golf, Inc., [2006] SCC 52, 45 (Can.) (suggesting the use of letters rogatory).

Assistance procedures include the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163, available at http://www.hcch.net/index_en.php?act=conventions .text&cid=17 (last visited Jan. 3, 2008), and the Hague Evidence Convention, or in U.S. federal law, 28 U.S.C. § 1782. See also Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (reading 28 U.S.C. § 1782 to give courts broad discretion to offer assistance). Within the European Union, these matters are governed by Council Regulation 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2000 O.J. (L 160) 37, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_160/l_160200 00630en00370052.pdf (last visited Jan. 3, 2008), and Council Regulation 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_174/l_17420010627en00010024.pdf (last visited Jan. 3, 2008) (hereinafter Council Regulation 1206/2001). See also ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 16.3 (contemplating voluntary procedures to gather evidence from nonparties).

For an example of a dismissal conditional on an agreement to waive objections to a procedural opportunity available in the court dismissing the action, but not in the court in which the case will be refiled, see In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 205-206 (2d Cir.), cert. denied, 484 U.S. 871 (1987) (forum non conveniens dismissal conditional on an agreement to allow U.S.-style discovery in India permissible if reciprocal).

(c) Remedies, § 222(4)(e). Regarding retention of jurisdiction and entry of an injunction requiring enforcement abroad, cf. Australian Competition and Consumer Commission v. Chen (2003) 132 F.C.R. 309 (Austl.). In this case, the Australian court entered an injunction against a U.S. resident defendant whose "cyberscam" website, www.sydneyopera.org, purported to sell tickets to performances at the Sydney Opera House, but in fact was not affiliated with the Sydney Opera House, and kept customers' money and made no bookings; the court observed that "[w]hile domestic courts can, to a limited extent, adapt their procedures and remedies to meet the challenges posed by cross-border transactions in the Internet age, an effective response requires international cooperation of a high order." Id. 61. Catherine Lee, Australian Competition and Consumer Commission v Chen [2003] F.C.A. 897: What Do You Do with Overseas Cyberscammers?, 15 Ent. L. Rev. 30 (2004).

4. Appeals. It would be possible to deem orders on coordination to be nonappealable. However, there are advantages to giving the parties their day in an appellate court, cf. 28 U.S.C. § 1292(b) (permitting interlocutory appeals when an immediate decision "may materially advance the ultimate termination of the litigation"); § 1651 (permitting review by writ of mandamus when necessary "in aid of [the appellate court's] jurisdiction[ ]").

§ 223. Disposition of the Dispute by Other Court or Courts Seized with the Action

(1) When the court designated by § 221 asserts coordination authority, courts in which related actions are pending shall suspend proceedings awaiting:

(a) a determination by the designated court that the suit falls within the Principles; and

(b) that court's decision, in accord with

§ 222, whether there should be coordination, and, if so, whether the method of adjudication should be by cooperation among the courts seized, or by consolidation of the entire dispute before one court.

(2) If the court designated determines that the dispute should be adjudicated cooperatively, courts in which related actions are pending shall consult with the parties, the court first seized, and other courts in which related actions are pending, to determine the scope of each court's authority and the timing of each court's proceedings.

(3) If the court designated by § 221 consolidates the dispute and chooses the court in which the consolidated action will be adjudicated, courts other than the consolidation court shall suspend proceedings in any action within the scope of consolidation. If any court suspends its proceedings under this subsection, it may order the litigants to provide security sufficient to satisfy any final decision on the merits.

(4) When a court has suspended its proceedings under subsection (3), it may resume proceedings if:

(a) the consolidation court declines to exercise jurisdiction or determines that the actions are not subject to coordination;

(b) the plaintiff in the suspended action fails to proceed in the consolidation court within a reasonable time; or

(c) the consolidation court fails to proceed within a reasonable time.

(5) Another court seized with the action shall dismiss the suspended case when presented with a final judgment rendered by the consolidation court that decides the claims on the merits in compliance with the requirements for recognition or enforcement under Part IV of these Principles.

(6) The judgment rendered through coordinated adjudication does not foreclose proceeding with claims that were not made subject to coordination.

Comment:

a. The duty of other courts. Once a court takes coordination authority over a dispute and designates the related actions that will be coordinated, the courts where these actions are pending should suspend proceedings to await that court's determinations. If the dispute is coordinated through cooperation, § 223(2) instructs the courts to facilitate that approach. If the dispute is consolidated, other courts should suspend proceedings. Once an enforceable judgment is rendered, these courts should dismiss the suspended cases. However, if there is no activity within a reasonable time period, the related actions can be revived. Because this approach to multinational adjudication is new and creates novel opportunities for delay, the Principles also give the other courts authority to assure the litigants that they will eventually be able to collect on the judgment. Thus, these courts may require the parties to post security (§ 223(3), Comment b), and can order provisional and protective measures within their territories (§ 214(2)).

b. The duties of the parties. Although many of these actions can be taken by the relevant court on its own motion, in most cases the parties will play an active role. Thus, the parties will have the burden of going forward to refile their actions in the consolidation court. They will usually be obliged to notify and to move to suspend proceedings in other courts where related actions are pending and to have related proceedings dismissed. In addition, the parties

may request the posting of a bond to secure the satisfaction of the judgment. This decision, which usually entails considerations concerning the potential insolvency of the defendant, and other risks of harm, depends (as with other procedural matters) on the law of the forum State. Similarly, if the consolidation court does not proceed in a timely manner, the parties will be responsible for reviving the suspended actions.

c. Compliance with coordination. The Principles use enforcement as a compliance mechanism. Once a decision on coordination is made, judgments rendered by courts that are not chosen to participate in the adjudication may not be enforced in other States (§ 403(2)(c) and (d)). However, if the dispute is not coordinated or the coordinated case does not proceed in a reasonable time, then § 223 allows the initial courts to proceed to adjudicate. In that situation, there is no obstacle under the Principles to enforcement.

d. Delay. A key concern with a procedure such as the one contemplated by these Principles is that the parties will use the potential for consolidation as an opportunity for delay. It is hoped that as courts become familiar with these procedures, they will begin to consult with one another to reach the decision on how to best adjudicate a complex dispute. In the absence of an informal mechanism, the courts will work through the parties. In addition to the provision on security (§ 223(3)), the Principles give the other courts residual authority to decide the case if it is not heard in a reasonable time (§ 223(4)) (implicit).

REPORTERS' NOTE

Duties in cooperative proceedings. The ALI's Transnational Insolvency Principles volume provides detailed principles on how courts entertaining parallel bankruptcy proceedings should cooperate and coordinate. These include creating a protocol providing for approvals by the participating courts in decisionmaking, communication among creditors, as

well as time- and cost-saving procedures, Procedural Principle 14. In addition, there are provisions regarding actions affecting assets, notice to interested parties, information exchanges, as well as other facets of insolvency proceedings. This level of specificity is not possible for intellectual property because the cases covered by these Principles are too varied to be treated uniformly. Furthermore, there is insufficient experience with coordination to build upon. In fashioning new procedures, the ALI/UNIDROIT Principles of Transnational Civil Procedure should prove invaluable as they provide guidance on the issues the court is likely to confront, such as dealing with foreign languages (Principle 6); delay (Principle 7); structuring proceedings (Principle 9); the respective duties of the parties and the court (Principles 10, 11, 14); and judicial cooperation (Principle 31). See also Rules 8, 17, 18.